Supreme Court, U.S.
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NO. _____
Appl. No. A-893

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1994

In re [Pauline E. Humphries],
Petitioner,

v.

MARVIN T. RUNYON,
POSTMASTER GENERAL,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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103 pp

QUESTIONS PRESENTED

I. Did Congress intend to exempt the U. S. Postal Service from accountability and Judicial Review under the Administrative Procedures Act (APA) when it enacted Title 39, U. S. Postal Service Reorganization Act of 1970? Are the authority and powers of the U. S. Postal Service consistent with its enabling act? Did the U. S. Congress violate or infringe upon my rights under 28 U.S.C. S2403(A) with the enactment of Title 39?

II. Did the U. S. Postal Service deny my basic Constitutional rights as a 35 year employee with consistent excellent performance evaluations? Did the Congress intend to give the U. S. Postal Service

monopsony powers? The power to draw up its own procedure without complying with the Federal Laws and guidelines set by the Civil Service Commission (now Office of Management and Budget.) ? If so, does that mean that the Petitioner and 850,000 Postal Employees are not bound by procedures for other federal employees?

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I. The United States Postal Service obtained a "tainted" dismissal of Case No. 90-CV-773(AHN) [Humphries I]. The Court relied on the reputation and integrity of the U. S. Attorney and the presumption that the federal agency has fully complied with its own procedures and procedures are most likely correct. The Court relied on the word of the USPS Attorney, an officer of the court, before dismissing case on latches lapse by the Plaintiff. Misrepresentations by the USPS Attorney lulled the Court and the Plaintiff. . . . . ..

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- - - -

U. S. Postal Service, USCA NO. 93-6154 issued as a Mandate February 22, 1994.

OPINION BELOW

This petition seeks review of the decision by the United States Court of Appeals for the Second Circuit, which is reproduced in the Appendix (App.) at A1-A4.

JURISDICTION

The jurisdiction of this Court to review the Second Circuit's decision of February 22, 1994 is invoked pursuant to 28 U.S.C. s 2403(a) and Rule 10.1.(a) and (c) of the Rules of the Supreme Court of the United States.

CONSTITUTIONAL AMENDMENTS AND STATUTORY PROVISIONS

39 USC 409 - U.S.Courts have original jurisdiction, except as provided in section 3628.

28 USC 1331 -Actions "arising under the Constitution, laws, or treaties of the United States."

28 USC ss 1361, which gives districts courts jurisdiction of "any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the Plaintiff.

28 USC ss 1343(3) which provides jurisdiction to hear cases under 42 USC ss 1983 and other federal civil rights statutes.

28 USC ss 2343(3) provides jurisdiction to hear cases under 42 USC ss 1983 and other federal rights statutes.

Judicial Review Act of 1950. "The Court has power to make independent findings to such extent as the interest of justice may require and may exercise this power."

28 USC ss 1331 gives concurrent jurisdiction to the district courts when it is determined that Plaintiff's claims are controlled by federal law, whereas the court can then reach the question whether a cause of action governed by federal common law arises under the laws of the United States.

Title VII, 42 U.S.C s 20003-16 (race, color, religion, sex, national origin, or

reprisal), the Rehabilitation Act (handicap) and Age Discrimination in Employment Act (ADEA), 29 CFR 633A-1613.521.

STATEMENT OF THE CASE

Petitioner, Pauline E. Humphries, a resident of Massachusetts, a U. S. Postal Service Employee (U.S.P.S.), with 35 years of service and currently employed by the U.S.P.S as Postmaster in Riverton, CT., hereby submits the following statement of the case.

In 1980, Petitioner was serving as Procurement Specialist, Sr. in the Wethersfield, CT office and was dismayed by the cavalier manner in which procurements were handled by the Wethersfield Postal Manager, Mr. Thomas Butler. Competitive procedures were not being followed, contractors were left off the bidders lists and contractor evaluations were not being made as specified in the evaluation

procedures set out in the Invitation for Bid.

I applied for and obtained an assignment to a Bulk Business Mail Task Force in New York City. The detail was completed successfully and when Headquarters re-convened the Task Force, I was offered this assignment. My local manager, Mr. Thomas Butler and Regional Procurement Manager, Mr. Daniel J. O'Conner refused to release me, but the Regional Director of Mail Processing, Mr. Alan Kane was insistent and told. Local Management when Mail Processing needs assistance, it is expected that other functional areas cooperate. Mr. Butler and Mr. O'Conner interpreted my acceptance of this assignment as an act of defiance of their authority.

Towards the end of this detail I was in an auto accident while on official duty. I filed a Workmen's Compensation claim. When I was able to return to work, my manager prevented me from doing so; contrary to U.S.P.S. regulations in the Employee Labor Relations Manual (ELM), which require Management to assist personnel in returning to work as soon as possible when workmen's compensation is operative.

The scheduling of my physical with the Postal Service doctor was delayed several weeks. My personal physician, Dr. Leff of Springfield, MA. sent two letters to my supervisor stating I needed to return quickly to work. The U.S.P.S. doctor sent a penciled "buck slip" to my supervisor indicating my fitness for duty. My

Supervisor refused to accept a penciled buck slip from the U.S.P.S. doctor and also refused to permit me to work when I reported to the job.

Plaintiff's medical condition is in accord with the definition in 29 CFR s 1613.702. Plaintiff asserts that the intent of 29 CFR assumes that such conditions are permanent, thus, there is no requirement that handicapped persons to provide medical documentation on a continuing basis.

My Supervisor scheduled another physical several weeks later. The U.S.P.S. doctor informed me he was sending a formal letter to my supervisor stating that I was fit for duty.

Federal Employees Compensation agency (FECA) claim and coverage ended when my

Doctor sent in medical report stating I was fit to return to work. My Supervisor Mr. Thomas Butler called me into his office and screamed at me: "the USPS doctor works for us, not you and he had no right to send you back to work."

He then informed my subordinates "that they were not permitted to receive orders or instructions from me." The USPS should be held accountable to pay me from the period my doctor indicated that I was able to return to work and the FECA responsibility ended; and the duration of time my supervisor prevented me from returning to work.

I used upwards of $10,000 of personal leave while on Workmen's Compensation; ultimately Workmen's Compensation payment

caught up and I applied to FECA for authority to re-purchase this leave. FECA approved this leave by-back of upwards of $10,000, however, the Postal Service processed the leave at the end of the calendar year and the leave was forfeited, without the employee notification stipulated in U.S.P.S regulations, (ELM). I wrote my Supervisor, Mr. Butler a letter inquiring as to what happened to the leave I purchased, he responded with a "buck slip" instructing me to take care of it myself.

Plaintiff argues that in retaliation for serving on the task force as well as for filing a Workmen's Compensation claim, my manager, Mr. Thomas Butler permitted my doctor's letters to be opened in the mail room and shown to persons in the office in

violation of the privacy act, and I was also subjected to much verbal abuse and disrespect because "unstable angina" was interpreted by him to mean that I was mentally unstable. He wrote me a letter demanding that I retire, if not, that he would take action to do so. When I refused, he had me report for a "fitness for duty" exam during July 1985, at the Elizabeth Hospital, Boston, MA, which turned out to be a psychiatric examination.[1]

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[1]An article in the Texas Dallas Morning News stated: "Some military whistle-blowers have been forced to undergo psychiatric evaluations as intimidation or reprisal." An investigation found that most had spotless records until they challenged the system." This sadly sounds like the procedures used in the Soviet Union to stiffle dissent.

With regard to the Defendants' challenge of subject matter jurisdiction of the court (5 USCs 8128(b)(2) and Fed R of Civil P. 12(h)(3) show that exceptions to the exclusive remedy rule are matters that do not fall within the coverage of the Act and Plaintiff has provided prima facie evidence of facts that would negate application of the exclusive remedy. Therefore, exclusive remedy cannot act as a bar. In order to avail itself of statutory immunity of exclusive remedy, the employer must comply with all provisions relating to Workmen's Compensation disability. The Courts have ruled that an employer should not be allowed to use the "exclusive remedy" as a shield against tort liability of egregious conduct. The cause of action

(retaliation, discrimination, and violation of privacy) are not barred as an exclusion to the exclusive jurisdiction of FECA. The USPS failed to inform Plaintiff of the potential for leave forfeiture, thus depriving her of her constitutional due-process rights.

The Court, in Hayes v. Johnson 578 F. Supp 685, 689-90 (ED Mich 1983), modified Hayes v. Vessey, 777 F.2d 1149 (6th Circ 1985) stated: 'once a cause of action for a violation of a substantive constitutional right has been stated, affirmative defense created by state law...will have no effect in barring or delimiting recover." (See also Rose v. Cantrel 705 F.2d 1208, 1221 (10th Cir), (cert denied, 464,US 821(1983).

Subsequent to the "Fitness for duty" examination in Boston, MA, my supervisor began assigning work to me and expecting to sign as Contracting Officer for contract awards made by subordinates who did not follow the procurement procedures in advertising, nor evaluating these awards. U.S.P.S. procedures require irregularities to be reported to the Inspection Service. I complied with the Administrative Support Manual (ASM) of the USPS and dutifully made a written report to the Inspection Service.

Another example of Postal intransigence was evident in the case of Emery Air Freight. A federal judge in Washington DC voided Postal Air Inc's 10 year, 1 billion dollar contract citing improper contact between the government agency and an

official close to the carrier. "The judge blasted the Postal Service for allowing Mr Cole to remain on the job.".[2]

Emery Air Freight also filed suit in federal district court to block the U.S.P.S. from awarding an eight year, $80 million contract to Evergreen International Airlines, charging that Evergreen based its proposal, in part, on wages that fell below federally mandated standards of the Service Contract Act.[3]

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[2]Journal of Commerce January 6, 1993.

[3]Journal of Commerce Jan 5, 1993

The USPS was going through a reorganization in 1986; our Wethersfield, CT. office was slated to be closed. I was were required to apply for positions anywhere in the United States which were being filled under the Merit Promotion Regulations. I applied for over 275 positions, and was never considered because all my applications were held by my District Manager until one day after the closing date. Other employees were writing their own Promotion Potential Evaluations in violation of the USPS Promotion Procedures and the USPS Regulations covering Ethics.

I documented this and sent a letter to the Inspection Service in compliance with USPS Administrative Support Manual (ASM) which require Merit Promotion procedural

irregularities to be reported to the Inspection Service. This time, the Inspection Service called me in for an oral interview and assured me future applications under the Merit Promotion Program would get processed on time. Upon the closing of my department, I was the only one left without a position and was reassigned to a duty station in Farmington, CT, at a four grade reduction in rank. The trip from home to work was well beyond the legal commute mileage covered by USPS regulations. Postal Service Regulations also require that a downgraded person receive priority consideration on future applications for re-promotion.

Petitioner filed an Equal Employment Opportunity Complaint (EEO) with the USPS on

April 6, 1986. The USPS offered no conciliatory and administrative remedies. One year and a day later, the USPS counselor ruled there was no discrimination in my case and I was not furnished a copy of his initial investigative file. I did not file a formal complaint at that time because I did not believe that I would receive fair consideration from the Postal Service.

On September 30, 1988, petitioner sought EEO Counseling on two (2) positions. Case Nos. 6-F-0054-90 and 6-F-0055-90 claiming discrimination on the basis of race (Caucasian), sex (female), age (52), physical handicap (heart, legs, angina) and a perceived mental handicap, as well as reprisal for prior EEO counselling. Expecting that the EEO counselor to contact

me in 30 days, I inquired of EEO counselor as to when I could expect to hear from him; he informed me that USPS had no time limitations.

In mid June 1989, Mr. Harvey, USPS EEO counselor overheard me talking in the "break" room that I was looking forward to the 4th of July weekend because I was taking leave to participate in a family function.

On June 26, 1989 at 4:00 PM (eight months after the initial complaint), Mr. Harvey called me in for a final interview, stating discrimination charge was denied by management and indicated I had fifteen days to file a formal complaint. I indicated that, at this time I would be filing a formal complaint. Mr. Harvey informed me that I would have to be very specific,

delineating all the facts, including names and dates or my complaint would not be accepted. I felt very pressured by him, and I reminded him that this rehashing was creating a physical toll by exacerbating my angina condition.

Again, I went to Mr. Harvey to be sure I understood him correctly. Once again he told me I had to be specific and provide all the details or that my complaint would not be processed. I thought the fifteen (15) days were exclusive of Saturdays, Sundays and holiday, but when I checked with Mr. Harvey, he said that the 15th day had already passed. Mr. Harvey told me the complaint, most likely, would be rejected as untimely. I replied that discrimination was still evident and that I would start the

process all over again. I followed Mr. Harvey's instructions. My document to him was fourteen (14) pages and nine (9) days late (July 20, 1989), with last two (2) pages devoted to equitable reasons.

Defendant had an obligation to inform Plaintiff of Relief offered by 29 C.F.R.s 1613.214(a)(4)(1981) wherein the USPS had the authority to extend the filing time for equitable reasons. The USPS failed to exercise it's power in a reasonable manner to accomplish an objective within the scope of its authority and abused its discretion by not complying with the spirit and intent of promulgated regulations.

Seven (7) months later (February 6, 1990) the USPS issued their final agency

decision, rejecting my complaints as untimely. I appealed to Office of Review and Appeals (ORA) and the Equal Employment Opportunity Commission (EEOC) stating "the preparation of my appeal was and is, in fact, life threatening and it was physically impossible to make a timely filing." USPS "asked ORA to deny my request to reopen and reconsider in that it fails to meet the criteria for granting such a request."

I contended that the Postal Service created a situation which aggravated my physical condition; couldn't have stated it any plainer that this created a situation of danger, including anguish and suffering of both mind and body. ORA complied with USPS's urging.

Throughout this long arduous process

, the U.S.P.S. avoided opportunity for conciliatory and administrative relief; they are well aware of "discrimination complaints" and should have been aware that the statuary scheme favors administrative handling of discrimination claims. [ROSS V. U. S. Postal Service, 696 F2.d 720 (1983)].

On September 18, 1990, Plaintiff filed a court action regarding both complaints, they were merged and became CV-90-773 (AHN) in United States District Court, District of Connecticut. (See Appendix C)

Plaintiff asserted that the Defendant deliberately let the time limits of the "Order on Pre Trial Deadlines" expire so as to gain an advantage of a Pro Se Plaintiff who was expecting the Court to order

discovery, - only to find that the "discovery" deadline had passed. The Defendant deliberately missed the deadline to out maneuver a Pro Se Plaintiff and failed to offer any reason for so doing.

At oral arguments on December 23, 1991, the Plaintiff informed the Court the agency was not in compliance with their own regulations, which require the EEO Counselor to keep the complainant informed and provide the complainant with the initial investigative file within 30 days.

Defendant's Attorney Janes testified that the Defendant was not required to investigate a complaint until acceptance of the complaint, which would then start the thirty day time frame for investigation

(Defendant is using the operative words "acceptance of a complaint.") This contradicts USPS instructions furnished to EEO Complainants and violates 29 CFR s1613.214(3). It is also noted, the USPS did not furnish the complainant the investigative file, nor meet the thirty day time; as it took seven (7) months to reject the complaint as untimely. The U.S.P.S. Attorney erred or otherwise misstated these timeframes at oral arguments on December 23, 1991. This point was critical to the Plaintiff losing on the equitable tolling issue rather than on the merits of the case.

The USPS attorney had posted her appearance for the oral arguments; therefore the U. S. Attorney did not participate in court arguments on December 23, 1991; but

the Plaintiff did note, the U.S. Attorney posted her disappearance the next day and another U. S. Attorney posted his appearance with the court. The inference Plaintiff drew from this was most likely the improper interpretations the U.S.P.S. Attorney was asserting to the court regarding the investigative file and when the 30 day clock starts for the Postal Service.

Plaintiff notes the U. S.P.S. Poster No. 72 dated December 1993 now clarifies this interpretation to read: "An EEO counselor/investigator will look into your problem and try to bring about a resolution within 30 days. If the counselor /investigator is unable to accomplish this, and you agree to extend the time period, the

pre-complaint processing period will be no longer than 90 calendar days. If the matter is not resolved by the conclusion of the counseling process, the EEO counselor/investigator will advise you of the procedures for filing a formal complaint."

In September 1991, the Plaintiff received two Headquarters Performance Awards for her performance in bringing two Asset Inventory Management (AIM) sites up to and over the national standards. Only eight awards were made throughout the U.S. and Plaintiff received two of these eight. This indicates that Plaintiff was still judged to be competent and productive.

On October 16, 1991 the Plaintiff was

again the victim of arbitrary, continuing discrimination; she was removed from her position as Materiel Management Specialist and placed in another position, within the department, noted for its hostile work environment. The Manager of this department recommended against this forced reassignment, but Upper Management levels prevailed. I did not file an EEO Complaint because I was traumatized. I was anticipating the investigation of complaint which the USPS Attorney had committed to the court under 90-773 (AHN) (Humphries. I).

In October 1991, Plaintiff again experienced discrimination when she was not considered for two promotional opportunities at the Windsor, CT office; less experienced persons received promotions. Plaintiff

charged continuing discrimination. (This is indicated in 92-CV-000979 (JAC) in United States District Court, District of Connecticut (Humphries 2)

The Plaintiff was mislead by the USPS commitment to the Court, in April 1992, which indicated that if I met my filing time, a full investigation would be undertaken for the continuing discrimination complaint filed on October 1, 1991.

The issues involved in Humphries II were initially reported to the Chief Postal Inspector, Washington DC via my letters of April 23,1991 and April 29, 1991; I was following the instructions required by the USPS Employee Labor Relations Manual, Sec 311.27. No response was received from the

Inspection Service. Deviations and waivers continued to be approved by Mr. Leavey, Headquarters Manager responsible for assuring the integrity of the Merit Promotion Program.

These waivers were suggested by Ms. Laura Helwig of Headquarters (the unqualified, but successful candidate in Humphries I). Mr. Montes, Regional Director, Procurement, Windsor, CT responded to Ms. Helwigs suggestion and requested a waiver from the Merit Program to restrict personnel at my agency, Hartford, CT (10 minutes down the road) from competing. for these positions. Mr. Davin ,Headquarters Head of Procurement[4], signed the

[4] Mr. JohnDavin, whom Plaintiff has named in her formal complaint and the originator of the "book of ethics he wrote for his officials in the field" was just "ahead of the times" when he was "snagged" on Ethics Violations as reported in the Federal Times- October 1992.

Determination and Findings (D&F) which obtained the approval of Mr. Leavey. Plaintiff filed her formal complaint on April 15, 1992, on time, and fully expected the 30 day investigative period to commence on April 15, 1992 as previously attested to by Attorney James of the USPS during oral arguments in Humphries I. When the Postal Service Reported to the Court that I had met my filing time, the Court issued a Judgement in Humphries I. (Appendix C).

Plaintiffs complaint of April 15, 1992 requested the USPS furnish her a copy of the initial investigative report. USPS did not respond to this written request. Plaintiff also called the Postal Service attention to their Poster No. 72-A (Jan 1990) which states "if the final counseling interview

has not been completed within 21 calendar days of your first contact with the EEO counselor, you have a right to file a complaint at any time thereafter, up to 15 days after the final interview." goes on to state "you may also file a civil action in an appropriate Federal District Court it you have not received final agency action within 180 days of filing your complaint." EEO counselor informed the Plaintiff that "those time frames were too rigorous." Plaintiff finds it incredible that the USPS cannot meet the timeframe of their own regulations, which must comply with 29 CFR 1613.213.

Plaintiff had been advised by USPS EEO Counselor that complaints against Headquarters personnel could not be investigated locally and would have to be

forwarded to Headquarters, Washington, DC. for investigation. Yet, the USPS Manager EEO Complaints Processing, Hartford, CT acknowledged receipt of formal complaint on April 15, 1992; but he held it until August 14, 1992 before sending formal complaint to Headquarters.

USPS Attorney Janes has failed to supervise the U. S. Postal Service compliance with its clear legal duty to assure Plaintiff was afforded her constitutional right to due process. Attorney Janes, a Postal Service Attorney located at Windsor, CT was specifically requested by the Court (Humphries I) to apprise herself of the status of the complaint filed on October 1, 1991 (Humphries II) and make sure that the

complaint is considered timely.

Attorney James failed to follow instructions of Judge Nevas. Plaintiff has previously informed the Court in Humphries I that the USPS is recalcitrant. Plaintiff must conclude that agency's unwillingness to comply with a non-discretionary duty is an arbitrary, capricious, and abuse of discretion or otherwise not in accordance with the law under ss 706(2)A of the Administrative Procedures Act (APA).

After another five months elapsed with no contact from USPS, no attempt at investigation or conciliation, I realized the decision in "Humphries I" had been unfairly obtained through misrepresentations and was tainted.

The Court in Humphries I did have some options, ie.

A. Time Limits in Title VII are in the nature of Statute of Limitations and do not affect District Court's subject matter jurisdiction. Civil Rights Act of 1964, s 701 et seq. 717(e), as amended 42 USCA 2000e seq. 2000e-16(c). (Hornsby vs USPS 787.2d 87 (3rd Cir 1986)

B. Timely filing is not prerequisite to federal jurisdiction under Federal Rules of Civil Procedure - Rule 6(a) 28 USCA. (Milin v USPS 674 F.2d 860 (11th Cir Ct).

C. Federal employees may file action for employment discrimination after first seeking relief in agency. (Ross v USPS 696 F.2d 720 (9th Cir 1983)

D. Under the Doctrine of Equitable Estoppel, a Defendant is estopped to assert the statute of limitations if action by him have caused Plaintiff to fail to file his complaint within prescribed period. (Gerringer v. Silverman 731 F.2d 1272, 1278) (Bomba v.Belvidere, Inc. 579 F.2d 1067 (7th Cir 1978)

E. The Courts have ruled "where a Plaintiff is not complaining of a discrete act of discrimination, the Doctrine of Continuing Discrimination may exempt him or her from strict time requirements of Title VII. The rationale for this doctrine is 'to provide a remedy for past actions which operate to demonstrate against the complainant at the present time. (511 F.2d 1228, 1234 (8th Cir Court 1975 Olson v

Rembrandt...Plaintiff has demonstrated a series of related acts - Valentine v USPS 674 F.2d 56) RETALIATION need not exhaust administrative remedies before seeking judical review of retaliation claim that grows out of an earlier charge. See 809 F.2d (5th Cir 1987) Gottlieb v Tulane or 654 F2.d 411 (5th Cir 1981) Gupta v. East Texas State University.

F. "Whistleblower Law Ruled Retroactive" MSPB has ruled that when a whistleblower has been harmed time and again, the board can group the wrongs suffered and apply the stronger law, even if such incidents preceded the change in the law. A claim to redress a continuing wrong is deemed to have accrued on the date of the

last wrongful act. Source: Federal Times, September 23, 1991 by K. Hughes.

G. Age Bias Claims May By Pass Agency Complaints Process. "In Stevens, the government sought to dismiss an age discrimination lawsuit at the district and appellate court levels on the grounds that the Plaintiff, a Treasury employee, had not exhausted administrative remedies." The Supreme Court agreed to review the case since appeals courts had been divided on the issue."

But the Supreme Court never got around to resolving the discrepancy because the government revised its position in its arguments before the court saying that exhaustion of administrative procedures was not required."

"The government's change-of-mind in Stevens suggests that the decisions upon which GAO premised its exhaustion argument may have lost persuasive force." Source- Federal Times - July 22, 1991 by Ellen Rafshoon.

Defendant again violated my constitutional rights of due process; due notice and opportunity to be heard in the performance of administrative obligations under statutes pertaining to 5 U.S.C., 8101-8151; 42 U.S.C. 2000e-16 of Title VII Employment Discrimination and USC 29 633a(b)-1613.521 of Age Discrimination in Employment Act and the Rehabilitation Act of 1973.

On November 23, 1992, Plaintiff filed for injunction and/or declaratory judgement under 28 USC 1331.

On December 23, 1992, Plaintiff received Defendant's Dismissal of Case No. 6-F-0028-92 in compliance with EEO Regulations covered by 29 C.F.R s1614.107(c) which dismissed Plaintiff's complaint "as an employee who is perceived as mentally unstable."[5] If this were true, how could Plaintiff receive outstanding awards for work performance?" Plaintiff considers this

[5]As an employee, the USPS is in a "peculiar position" to harass an employee.."as an employee, the Plaintiff, should entitle him to a greater degree of protection from insult and outrage than if he were a mere stranger." Malevolence and enmity towards this complainant is unworthy of the USPS.

[6]The USP "play with words" and "definitions" is even too much for the very top 800 executives of the USPS who have filed an EEO action based on race and/or age discrimination. (Federal Times Feb 1993) Plaintiff wonders what these executives were doing back in January 1992, when 42,910 EEO cases were backlogged. (Federal Times Jan 1992)

an injurious act without legal justification. Doing a wrongful act intentionally, without just cause or excuse shows the Defendant acted in an illegal, arbitrary manner.

I am still harassed for filing EEO Claims and Court Actions. A Postal reorganization in 1993[6] caused me (with 35 years of service and consistent performance ratings of "very good" or "outstanding" to be denied a position commensurate with my experience and ability.

In March 1993 I received an assignment to a Postmaster's position six grades lower than my rank and a full hour away from my home-the trip is via country roads which are particularly hazardous in winter months. This creates a very long day for a

physically handicapped individual. I did not file an EEO Complaint about this matter because I am overwhelmed by postal managements lack of concern and the current court action.

Plaintiff offers a synopsis of the Administrative Procedures Act (APA) from the Federal Bar News Journal - Sep 196/Vol. 33 Page No. 299 to summarize her reasons for reversal:

> "The APA provisions on judicial review are only partially to blame. Sec 706 spells out a scope of judicial review test that is, on its face, quite deferential. To be found unlawful, an agency act must be either unconstitutional, ultra vires, procedurally unlawful, unsupported by substantial evidence or arbitrary, capricious (or) an abuse of discretion. Nevertheless, courts have not only opened the doors to more litigants by limiting standing, ripeness, and reviewablity barriers, they have basically turned the Section 706 test into one that

> can be summarized as: "was the agency action reasonable or unreasonable?" Indeed, as the ABA Administrative Law Section's recent attempts to parse the true meaning of Section 706 shows, courts have made use of a variety of arrows in their quiver when seeking to shoot down agency action."

REASONS WHY THE WRIT SHOULD ISSUE

A statute rarely specifies which of the circumstances conditioning legality are "jurisdictional." But a court will not lightly assume that an agency has been empowered to adjudicate any controversy which it chooses, and once this is granted, the notion of "jurisdictional" limit enters the picture. The court will ordinarily assume that it has both the power and the duty to determine a question asserted to be jurisdictional. Behind such assumption there stands the premise that the judiciary is the

ultimate guarantor of legality, that judicial control of official action is, therefore, the rule, an exclusion the exception.

While exhaustion may be a defense to judicial review of an administrative action, not yet deemed complete, the court may still have jurisdiction over the cause of action to which decision of the issue is relevant. Where it can be shown that the prescribed administrative remedy fails to comply with the requirements of procedural due process, the rule does not apply. [Utley v.St. Petersburg, 292 U. S. 106, 54 S. CT 712 (1934); Munn v Des Moines Nat. Bank (C.C. 8th 1927)]

It should be held that resort to the courts is not premature, even though the

administrative formalities have not yet beencompleted. (City Bank Farmers Trust Co. v Schnader, AG of PA, 291 U.S. 24, 54 S. CT 259 (1934).

The Plaintiff has shown that exhaustion is completed at the point where agency personnel refused to further process complaint and pass it on to the next level in the chain of command. "judicial is not needless wasted on our interpretation of the exhaustion requirements here, should help insure, in the future, federal agencies process such complaints in accordance with their own procedures, rather than short circuiting them into federal court." [Penn v. Schlesinger 490 F.2d 700 (5th Cir 1973)]

Plaintiff complied with agency regulations, but agency ignored its own

regulations:

1. Employee and Labor Relations Manual, Section 311.27 states: "Postal Inspection Service. Investigates instances of irregularities in the employment and placement process and related activities, as required.

2. Administrative Support Manual, Section 123.36 "Judicial Officer Department" 123.361.b. "Serving as the agency for the purpose of requirements of the Administrative Procedures Act." Plaintiff asserts USPS regulations do no informs USPS employees that the USPS exempt from portions of the APA.

3. Administrative Support Manual, Sect 228 "Assaults", 228.11. "The Inspection Service investigates employment-related

assaults and threats against postal employees while on duty or because of the employee's official employment.

4. Administrative Support Manual, Section 121.3 Law Department. Section 121.3c "Preparing the legislative program of the Postal Service and publishing regulations in the Federal Register."

5. Administrative Support Manual, Section 240, Audits. Section 243.1b "Determine compliance with Postal Service policies and procedures and public laws;"

6. Administrative Support Manual, Section 310 Directives Systems. Section 311....."Directives are codified for ease of reference, filing, revision and recision, and so that employees can readily locate and maintain required material." Section

313.12. "Groups and Departments are responsible for ensuring that their directives are current, complete, and adequately cleared. Any directive that (a) will cause the implementation of any technological and mechanization changes; (b) directly related to wages, hours and other terms and conditions of employment;.....must be cleared through the Assistant Postmaster General Labor Relations Department."

7. Administrative Support Manual, Section 353.131 "Postal Employees." The Privacy Act provides criminal penalties, in the form of fines and up to $5000, for any officer or employee of a federal agency, including the Postal Service, who:

a. Knowing that disclosure of specific material containing information about a person is prohibited, willfully disclose that material in any manner to any person or

agency not entitled to receive it; or willfully maintain a system of records containing information about individuals without giving appropriate notice in the Federal Register.

I. Federal APA ss 551(1), the act, applies to every "authority of the Government of the United States" other than "the Congress [and] the courts." Judicial review of agency action, including agency rules for errors of law and for reasonableness in finding of facts or exercising discretion is required because Plaintiff challenges agency's unconstitutional action, which is inconsistent with the applicable substantive law, or that it was otherwise arbitrary or capricious.

II. The Fifth amendment to the Constitution, which applies to the federal

government, provides that no person shall "be deprived of life, liberty, or property, without due process of the law."

28 U.S.C. ss 1331 covers actions "arising under the Constitution, laws, or treaties of the United States." This section is adequate to provide for jurisdiction to review the actions of any federal agency or official in federal court. APA ss 703; Fed.R. Civ.Proc. 25(d)(2). [Califano v Sanders, 430 U.S. 99 (1977)]

APA ss 706(i) clearly provides that a court can "compel agency action unlawfully withheld."

28 U.S.C. ss 1361, gives district courts jurisdiction of "any action in the nature of mandamus to compel an officer or employee of the United States or any agency

hereof to perform a duty owed the plaintiff."

28 U.S.C. ss 1343(3) which provides jurisdiction to hear cases under 42 U.S.C. ss 1983 and other federal civil rights statutes. Section 1983 action provide a remedy against state officials who have subjected persons to deprivation of constitutional rights.

Plaintiff is entitled to invoke her rights to due process, because (1) an injury has occurred to the Plaintiff; (2) the Defendant is at fault; (3) a remedy exists; (4) Plaintiff will endeavor to muster the resources to pursue the remedy and (5) the benefits of pursuing the remedy outweigh its costs. Plaintiff has learned that asserting one's rights to due process with

the U.S.P.S. are considered hostile acts, which set the pace for continuing discrimination, retaliation and harassment.

"People approach these programs, then, in a vulnerable personal situation, and are confronted with ambiguous information. At this point they face a hostile government bureaucracy--waiting rooms, offices, receptionists, officials, papers, forms, questions)"[7]

---

[7] J. Handler, THE CONDITIONS OF DISCRETION 22-32 (1986)
[8] Meyer v Nebraska, 262 US 390, 399.

The language of the fifth and fourteenth amendments is clear: "to be entitled to procedural due process, a person must be deprived by government of "liberty" and "property". "For [w]here a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him, notice and opportunity to be heard are essential." Wisconsin v Constantineau, 400 US 433, 437.

"While this Court has not attempted to define with exactness the liberty....guaranteed [by the Fourteenth Amendment], the term has received much consideration and some of the included things have been definitely stated. Without a doubt, it denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children to worship God according to the dictates of his own

conscience, and generally to enjoy pursuit of happiness by free men."[8] In a Constitution for a free people, there can be no doubt that the meaning of "liberty" must be broad "[t]o be deprived not only ofpresent government employment but of future opportunity for it certainly is no small injury..." The Court has held that a State, in regulating eligibility for a type of professional employment, cannot foreclose a range of opportunities "in a manner....that contravene[s]....Due Process," and, specifically, "in a manner that denies the right to a full prior hearing."

Plaintiff has a legitimate claim to entitlement to promotion, which she relied on, which was arbitrarily undermined by the Defendant. "The length of wrongful deprivation of...benefits [also] is an important factor in assessing the impact of official action on private interests." Plaintiff has been deprived of an opportunity to vindicate her claims.

"Chandler v Roudebush, 45 U.S. 840, strongly supports respondent's contention that Congress intended one in his position to have a trial de novo on his Title VII claim."

Also 713 F.2d at 1441. "The Secretary's ill-advised policy of refusing to obey the decisional law of this circuit is akin to the repudiated pre-Civil Era doctrine of nullification where rebellious states

refused to recognize certain federal laws within their boundaries. The Secretary's non-acquience not only scoffs at the law of this circuit, but flounts some very important principles basic to our American system of government--the rule of law, the doctrine of separation of power's embedded in the constitution, and the tenet of judicial supremacy laid down in Marbury v Madison...The government expects its citizens to abide by the law - no less is expected of those charged with the duty to faithfully administer the law."

Crowell v. Benson, 285 U.S. 222 (1932)involved judicial review of a commissioner's decision. "[T]he question [is] whether....Congress may substitute for constitutional courts, in which the judicial power of the United States is vested, an administrative agency....for the final determination of the existence of the facts upon which the enforcement of the constitutional rights of the citizen depend. [Allowing Congress]...[to] completely oust the courts of all determination of fact....would be to sap the judicial power as it exists under the Federal Constitution, and to establish a government of bureaucratic character alien to our system, whenever fundamental rights depend as not infrequently they do depend, upon the facts and finality as to facts become in effect finality of the law...In cases brought to enforce constitutional rights, the judicial power of the United States necessarily extends to the independent determination of

all questions, both of fact and law,- necessary to the performance of that supreme function." 285 U.S. at 56-57,60.

"Many decisions of this Court ..have unequivocally reaffirmed the holding of Marbury v Madison that '[i]t is emphatically the province and duty of the judicial department to say what the law is.'" United States v Nixon, 418 U.S. 1, 683,703 (1974)

CONCLUSION

For the foregoing reasons, the Plaintiff respectfully prays and requests that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Second District which afirmed the decisions of 93-6154 and 90-0773 and remand these issues for trial.

Respectfully submitted,

PAULINE E. HUMPHRIES
Pro Se
192 Beekman Place
Agawam, MA 01001
Tele: 413-786-5928

NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1994

Pauline E. Humphries,

Petitioner,

v.

Marvin T. Runyon,
Postmaster General,

Respondent.

APPENDIX

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Judge Cabranes
CTDC (New Haven)
92-cv-979

JMW

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 31st day of January, one thousand nine hundred and ninety-four.

PRESENT:

Honorable John M. Walker, Jr.,

Honorable Dennis G. Jacobs,
Circuit Judges,

Honorable T. F. Gilroy Daly,
District Judge.

- -

PAULINE E. HUMPHRIES,
Plaintiff-Appellant,

ORDER
No. 93-6154

-v.-

MARVIN RUNYON, Postmaster General,
U. S. Postal Service,
Defendant-Appellee.

- -

Appeal from the United States District Court for the District of Connecticut.

This cause came on to be heard on the transcript of record from the United States District Court for the District of Connecticut, and was argued.

UPON CONSIDERATION WHEREOF, it is now ordered, adjudged, and decreed that the judgement of said district court be and it hereby is AFFIRMED.

The Honorable T. F. Gilroy Daly, United States District Judge for the District of Connecticut, sitting by designation.

ISSUED AS A MANDATE. 2/22/94

Plaintiff Appellant Pauline E. Humphries appeals from a judgement of the United States District Court for the District of Connecticut (Cabranes, C.J.), dismissing her complaint. Prior to argument, Plaintiff Appellant moved this court to compel the United States Postal Service ("USPS") attorney to attend oral argument and explain certain representations made in the court below in a prior action. Since we are not authorized to conduct factual hearings or discovery, we denied the motion without prejudice to our consideration of the request as part of this appeal.

On the merits, we find no error in the district court's dismissal of the complaint. Many of the claims in the present complaint relate to the same actions of alleged discrimination that gave rise to a prior to suit by Plaintiff-Appellant. See Humphries v. Frank, Civ. No. H-90-773 (AHN)(D.Conn. May 21, 1992) ("Humphries I"). Humphries I dealt with claims of discrimination arising from Humphries being denied promotions by the United States Postal Service in 1988. Insofar as the present action seeks to relitigate issues that were, or could have been, litigated in that action, the district court properly dismissed the complaint as barred by the doctrine of res judicata. Allen v. McCurry, 449 U.S. 90,94 (1980)

To the extendthe complaint arguable alleges new claims: (1) Plaintiff-Appellant's claim based on a fellow employee's verbal assault is not properly before the court under the Federal Tort Claims Act, Keene Corp. v. United States, 700 F.2d 836, 840-41 (2d Cir.)(filing of administrative claim with appropriate agency is jurisdictional prerequisite to suit under Federal Tort Claims Act), cert denied, 464 U. S. 864 (1983); (2) there is no separate cause of action under Title VII of the Civil Rights Act of 1964 or the Fifth Amendment to challenge the Equal Opportunity Commission's claim processing procedures, McCottrell v. EEOC, 726 F.2d 350, 351 (7th Circuit. 1984); Francis-Sobel v. University of Maine, 597 F.2d 15, 17-18 (1st Cir.), cert-denied, 444 U. S. 949 (1979); (3) the provisions of the Administrative Procedures Act city by Plaintiff-Appellant do not apply to the USPS, Kuzma v. United States Postal Service, 798 F.2d 29, 31 (2nd Cir. 1986)(per curiam), cert. denied 479 U. S. 1043 (1987); and (4) her discrimination claims, assuming they are not barred by res judicata and were adequately pleaded, were properly dismissed because Plaintiff-Appellant failed to exhaust her administrative remedies, Bayer v. Department of Treasury, 956 F.2d 330,332 (DC Cir. 1992)

Accordingly, the judgement of the district court is affirmed. As we affirm on the merits, plaintiff's request that we remand to the district court for further proceedings is denied.

Hon. John M. Walker, Jr.
U.S.C.J.

Hon. Dennis G. Jacobs,
U.S.C.J.

Hon. T.F. Gilroy Daly,
U.S.D.J.

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

PAULINE E. HUMPHRIES :
: Civil Action No.
: 2:92-979 (JAC)
v. :
MARVIN T. RUNYON, :
Postmaster General of the
United States Postal Service

ENDORSEMENT RULING ON DEFENDANT'S
MOTION TO DISMISS

Pending before the court is the defendant's Motion to Dismiss (filed February 10, 1993) (doc. # 9). The Court heard oral argument on this motion, and considered the objections stated by the plaintiff, at a hearing in this matter on May 7, 1993. Based on the full record, this motion is hereby GRANTED substantially for the reasons set forth in the defendant's memorandum in support of its motion to dismiss, including, without limitation, the following reasons:

(1) the action is barred by the doctrine of res judicata, because there has already been a final judgment on the merits by a court of competent jurisdiction in another action involving the same parties

and the same issues--namely, Humphries v. Frank, Civil Action H-90-773 (AHN)(D.Conn. May 21, 1992);

(2) the Administrative Procedure Act, 5 U.S.C. ss 701, et seq., ("APA") does not give this court subject-matter jurisdiction over an action challenging the actions of the United States Postal Service, because 39 U.S. C. s 410(a) exempts the Postal Service from certain laws that apply generally to entities of the federal government, including the provisions of the APA on which the plaintiff relies;

(3) neither Title VII of the Civil Rights Act of 1964 nor the Fifth Amendment of the United States Constitution establishes a cause of action to challenge the investigation and processing of a discrimination complaint by the Equal Employment Opportunities Commission;

(4) the Federal Tort Claims Act bars the plaintiff's assault claim because the United States had not unequivocally waived immunity from assault claims such as the one alleged in this suit; and

(5) the plaintiff has not met the minimal pleading requirements, under Rule 8 of the Federal Rules of Civil Procedures, for any claims other than those asserted in the first Humphries action.

In sum, the Government's motion to dismiss is GRANTED,.

It is so ordered.

Dated at New Haven, Connecticut, this 10th day of May, 1993.

Jose A. Cabranes
Chief Judge

C1

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

PAULINE E. HUMPHRIES	)	
	)	2:90-cv-90-773
	)	(AHN)
VS.	)	
ANTHONY M. FRANK,	)	
POSTMASTER GENERAL,	)	
UNITED STATES POSTAL	)	
SERVICE	)	

JUDGEMENT

This action having come on for consideration of the defendant's motion to dismiss and/or for summary judgement before the Honorable Alan H. Nevas, United States District Judge, and,

The Court having considered the full record of the case including applicable principles of law, and the Court having

filed its Ruling on Motion to Dismiss and/or Summary Judgement, granting the motion to dismiss,

It is accordingly ORDERED, ADJUDGED AND DECREED that judgement be and is hereby entered dismissing the complaint.

Dated at Hartford, Connecticut, this 21st day of May 1992.

KEVIN F. ROWE, Clerk

By _____
Dennis P. Iavarone
Deputy in Charge

C3

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

PAULINE E. HUMPHRIES:
:
: Civil No. 2:90CV00773
: (AHN)
V. :
:
ANTHONY M. FRANK, :
POSTMASTER GENERAL :"
U. S. POSTAL SERVICE:

RULING ON MOTION TO DISMISS AND/OR FOR SUMMARY JUDGEMENT

Pauline E. Humphries ("Humphries") brings this employment discrimination action pro se against Anthony M. Frank, Postmaster General of the United States Postal Service ("Postal Service"). In her complaint, as construed by the court, Humphries alleges that (1) she was denied two separate job promotions on account of race, sex, age, handicap, and reprisal in violation of the federal Age Discrimination Employment Act, 29 U. S. C.s 621 et seq., the Civil Rights Act of 1964, 42 U.S.C. 2000e-16, and the Rehabilitation Act, 29 U.S.C. s 701 et seq.; and (2) she was denied compensation for Outstanding worker compensation claims for rehabilitation and medical costs.

The Postal Service moves to dismiss the complaint for lack of subject matter jurisdiction pursuant to Rule 12(b)(1), Fed. R. Civ. P. and for failure to state a claim

upon which relief can be granted pursuant to Rule 12(b)(6), Fed. R. Civ. P. and for failure to state a claim upon which relief can be granted pursuant to Rule12 (b)(6), Fed. R. Civ. P. In the alternative, the Postal Service moves for summary judgement pursuant to Rule 56, Fed.R.Civ. P. Humphries opposes both motions.
For the reasons stated below, the Postal Service's motion to dismiss and/or for summary judgement is granted.

Background

A. Facts

Humphries is employed as a Material Management Specialist for the Postal Service in its Hartford General Mail facility ("GMF") in Hartford, Connecticut. (Amend.Compl.,# 1.)

On September 30, 1988., Humphries requested Equal Employment Opportunity ("EEO") counseling concerning two, separate incidents. First, in case No. 6-F-0054-90, Humphries alleged that she was discriminated against on the basis of race (Caucasian), sex (female), age (52), handicap (heart, angina, legs), and reprisal for prior EEO counseling in not being selected for the position of Manager, Procurement and Material Management Service Office in Greensboro, North Carolina (the "Greensboro Promotion"). (See Def.'s Mem. Supp., Ex. # 5 ("Cosme Dec.").) Second, in Case No. 6-F-0055-90, Humphries alleged that being turned down for the position of Resource Specialist

in the Office of the Assistant Postmaster General, Procurement and Supply Department, Administrative Services Group, Postal Headquarters, Washington, D.C. (the "Washington D.C. Promotion") constituted discrimination. Again, Humphries alleged that such discrimination was based on race, sex, age, handicap, and reprisal. (Id at #6.)

Final interviews were conducted in both cases on June 26, 1989 by an EEO Counselor. At that interview, Humphries was given both oral and written notice of the fifteen-day time period for filing a formal administrative EEO Complaint. Specifically, the written notice, which Humphries signed, stated that she had the right to file a formal complaint "within fifteen days after receipt of this notice.": (See Def.'s Mem Supp Ex. B, ## 5-6 ("Harvey Dec."); Cosme Dec at ## 7-8.)

Humphries contacted EEO Counselor Bruce W. Harvey ("Harvey") on July 13, 1989 to inquire into the deadline for filing her formal complaints in the above matters. After checking her file, Harvey notified Humphries that the fifteen-day deadline expired on July 11, 1989. (Harvey Dec. at ## 7-9.) Only July 20, 1989 Humphries had delivered her formal complaints in both cases to the EEO office. (Harvey Dec. at # 11, Cosme Dec at #10.)

In a letter dated February 6, 1990, the Postal Service issued its final agency decision on the Greensboro Promotion case. The Postal Service rejected Humphries complaint as untimely in light of her

failure to file the complaint within the appropriate time limits. (Cosme Dec. # 11, Attachment 4.) Humphries appealed the Postal Service's decision to the Office of Review and Appeals ("ORA") of the Equal Employment Opportunity Commission ("EEOC"). On May 22, 1990, ORA affirmed the Postal Service's dismissal of Humphries complaint as untimely. (Cosme Dec. #12, Attachment 5.)

On February 7, 1990, the Postal Service issued its decision in the Washington, D.C. promotion case, similarly rejecting Humphries complaint as untimely. Again, Humphries appealed the Postal Service's decision to ORA. ORA affirmed the Postal Service's dismissal and rejected Humphries explanation for the late filing as inadequate for extending the filing deadlines in her case. (Cosme Dec at ## 13-14, Attachments 6, 7.)

On May 31, 1990, Humphries filed requests with the EEOC to reopen and reconsider the decisions in both of her promotion cases. The EEOC denied her requests. (Cosme Dec. at #15, Attachment 8.) On September 18, 1990, Humphries filed this action in federal court.

B. Procedural History

Although a complete recitation of the procedural history is not required, a brief overview of the procedural context in which the court considers the Postal Service's motion to dismiss and/or for summary judgement is helpful.

On April 23, 1991, the Postal Service filed its motion to dismiss and/or for summary judgement. In her objection to that motion and at oral argument, Humphries brought the court's attention to the fact that the Postal Service's motion was filed after the deadlines established for the filing of such dispositive motions. Specifically, the court's standing order was filed after the deadlines established for the filing of such disposition motions. Specifically, the court's standing order on pretrial deadlines (the "Standing Order") issued on September 18, 1990, the date Humphries filed her complaint, mandated that absent objection, all motions to dismiss based on the pleadings be filed "within 90 days after the filing of the complaint....." and that all motions for summary judgment are to be filed "within seven (7) months after the filing of the complaint." (Filing No. 3, Order on Pretrial Deadlines (September 18, 1990).) Thus, the Postal Service's motion was filed 115 days after the court's filing deadline for motions for summary judgement.

On December 23, 1991, the court held oral argument, the court requested that the Postal Service file a motion to modify the pretrial deadlines with a memorandum of law in support and that Humphries file a reply memorandum to the Postal Service's motion to modify. Because the Postal Service's motion to dismiss and/or motion for summary judgement is on its face untimely, the court concluded that it would be prudent to

consider the motion to dismiss and/or for summary judgment after the court ruled on the Postal Service's motion to modify the pretrial order.

On January 23, 1992 the court granted the Postal Service's motion to modify over the objection of Humphries in an endorsement ruling. (See Filing No., Endorsement Ruling on Def.'s Mot. to Modify Pretrial Deadlines (January 23, 1992).) [1]

---

1 The court sets forth the reasons for its granting of the Postal Service's Motion to Modify in the body of this ruling rather than in a separate opinion.

Discussion

As a preliminary matter, the court notes that Humphries' complaint is unclear on its face as to the exact nature of the relief sought and the specific statutory basis for her discrimination claims. [12] Relying on additional pleadings and exhibits filed by the parties, (See Filing No. 1, Amend Compl. Appendix A; Filing No. 9, Def.'s Mem. Supp. Mot. Dismiss), the court construes Humphries' complaint as alleging two distinct types of claims: (1) denial of worker compensation benefits; and (2) employment discrimination based on race, sex, age, handicap, and reprisal. The court is forced to make this construction for the purpose of evaluating the merits of the Postal Service's motion.

The liberal construction of a pro se complaint is well settled. See Haines v. Herner, 404 U. S. 519, 521, reh. denied, 405 U.S. 948 (1972). The failure by a pro se plaintiff, moreover, to cite a statute does not affect the merits of the claim. Rather, it is the factual allegations that control the court's consideration of the matter. See e.g., Albert v.Carovano, 851 F. 2d 561, 571 n. 3 (2d.Cir 1988); Newman v Silver, 713 F.2d 14, 15 n.1 (2nd Cir. 1983). Applying these rules, the court grants the Postal Service's motion to dismiss Humphries' worker' compensation claims for lack of subject matter jurisdiction and dismisses the employment discrimination claims for failure to state a claim.

A. Workers' Compensation Claims

The Postal Service moves to dismiss Humphries' workers' compensation claims for lack of subject matter jurisdiction pursuant to Rule 12(b)()1), Fed. R. Civ. P. A party may move to dismiss because of lack of subject matter jurisdiction at any time during the course of an action. Rule 12(b)(1), Fed. R. Civ. P.; Rule 12(h)(3), Fed. R. Civ. P.,John B. Hull,Inc. v. Waterbury Petroleum Products, Inc., 588, F.2d 24, 27 (2nd Cir. 1978), cert denied,k 440 U.S.960 (1979). Once challenged, the burden of establishing a federal court's subject matter jurisdiction rests on the party asserting jurisdiction. Thomson v. Gaskill, 315 U.S. 442 (1942); Grafon Corp. v. Hausermann, 602 F.2d 781,783 (7th Cir. 1979). Unlike a motion to dismiss pursuant to Rule 12(b)(6), Fed. R. Civ. P., however, dismissals for lack of subject matter jurisdiction are not predicated on the merits of the claim. Exchange Nat'l Bank of Chicago v. Touche Ross & Co., 544 F.2d 1126, 1130-1131 (2d Cir. 1976).

In a motion to dismiss for lack of subject matter, the court construes the complaint broadly and liberally in conformity with the principle set out in Rule 8 (f), Fed. R. Civ. P., "but argumentative inferences favorable to the pleader will not be drawn." 5A C. Wright & A. Miller, Federal Practice and Procedures 1350 at 218-219 (1990 & Supp 1991) ("Wright & Miller"). The mover and the pleader may

use affidavits and other materials beyond the pleadings themselves in support of or in opposition to a challenge to subject matter jurisdiction. Land v. Dollar, 330 U.S. 731 (1947); Exchange, 544 F.2d at 1130.

Lack of subject matter jurisdiction may be asserted at any time by the parties or the court, sua sponte, prior to, during, or after trial, even at the appellate level. Clark v. Paul Gray, Inc., 306 U.S. 583 (1939); 5A Wright & Miller, s 1350 at 202. Litigants cannot waive subject matter jurisdiction by express consent, conduct, or estoppel. Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee, 456 U. S. 694, 702 (1982); 13 Wright & Miller, s 3522 at 66-67.

Here, the Postal Service contends that the court lacks subject matter jurisdiction over her worker compensation claims. Specifically, the Postal Service argues that all worker compensation claims of federal employees, such as Humphries, are governed exclusively by the Federal Employees Compensation Act ("FECA"), 5 U. S. C. ss 8101-8151. The Postal Service insists that determinations of law and fact regarding worker compensation disputes under FECA are the sole province of the United States Department of Labor (DOL) and federal courts are prohibited from taking jurisdiction over any FECA issue prior to a final determination of those issues by the DOL and, then, only if the complaining party alleges a constitutional violation by the

Secretary of Labor (the "Secretary"). The Postal Service concludes that Humphries has never submitted her workers' compensation claims to the DOL nor does she allege a constitutional violation by the Secretary in the adjudication of those claims, and therefore, the court lacks subject matter jurisdiction. The court agrees.

It is well settled that FECA is the exclusive remedy for all workers compensation claims made by federal employees. 8 U.S.C. s 8116(c); see also Lockheed Aircraft Corp. v.United States, 460 U.S. 190 (1983); Johansen v. United States,343 U.S. 427, 433, reh. denied, 34 U. S. 848 (1952); Votteler v. United States, 904 F.2d 128, 130 (2d Cir.), cert. denied,___U.S._____, 11 S.Ct. 560 (1990); Wright v.United States, 717 F.2d 254, 257 (6th Cir. 1983); Concordia v. United States Postal Service, 581, F.2d 439, 442 (5th Cir. 1978); Joyce v. United States, 474 F.2d 215, 219 (3rd Cir. 1973); Balancio v. United States 267 F.2d 135 (2d Cir.), cert. denied, 361 U. S. 875 (1959). FECA's remedy is exclusive even where the work related injuries result from the aggravation of preexisting conditions that are non work related, see e.g., Votteler, 904 F.2d at 130; or where FECA fails to provide compensation for the full scope of the employees work related injuries, see e.g., Griffin v. United States,703 F.2d 321, 322

(8th Cir. 1983). FECA's provisions, moreover, apply to employees of the Postal Service. 39 U.S.C. s1995(c).

Under FECA's remedial scheme, the authority to make all determinations concerning awards or denials of compensation payments lies with the Secretary of Labor. 5 U.S.C. s 8124(a). Such determinations are "final and conclusive for all purposes with respect to all questions of law and fact." 5 U.S.C. s 8128(b)(1). Those determinations, moreover, are "not subject to review by another official of the United States or by a court by mandamus or otherwise." 5 U.S.C. s 8128(b)(2). "Moreover, district courts lack subject matter jurisdiction to consider an action where there is a substantial question of FECA coverage." Wright, 717 F.2d at 257; see also Paluca v. Secretary of Labor, 813 F.2d 524, 528 (1st Cir.), cert. denied, 484 U.S. 943 (1987); DiPippa v. United States, 687 F2d 14, 16 (3rd Cir. 1982); Reep v United States, 557 F.2d 204, 207 (9th Cir. 1977); Concordia, 581 F.2d at 442; Joyce, 474 F.2d at 219. While a plaintiff may seek judicial review of the DOL's FECA determination for an alleged constitutional denial of procedural due process, jurisdiction for such review is limited to cases where the Secretary's ruling is a final one on the merits and the plaintiff, therefore, has exhausted the available administrative remedies. See e.g., Walsh v. Donovan, 575 F. Suppl. 303, 306 (S.D.N.Y. 1983) (dismissing action for judicial review for lack of subject matter jurisdiction and failure to

state a claim because plaintiff had not exhausted DOL remedies and, thus, claim was not ripe for judicial review).

As construed by the court, Humphries seeks the type of judicial review of her workers' compensation claims that is expressly prohibited under FECA. In her complaint, Humphries expressly seeks "quantum determinations on entitlements denied by Postal Service Managers and/or Workmen's compensation; rehabilitation and payment of medical benefits." (Amen Compl., #3.) Other pleadings submitted by Humphries further suggest that she is seeking a review of denial of benefits pursuant to FECA. (See e.g., Filing No. 17, Pltf.'s Mem. Opp., Ex. I, J.) Humphries, moreover, has neither exhausted the administrative remedies available to her under FECA nor challenged on procedural due process grounds any final denial on the merits of her FECA claims by the DOL. Indeed, Humphries fails to name the Secretary of Labor as a defendant in this action but sues only the Postal Service, an agency that has no statutory authority to make final determinations concerning the awards or denial of workers' compensations claims under FECA. Accordingly, Humphries has failed to meet her burden of persuading the court that it has jurisdiction to review the denial of her workers' compensation claims, claims governed by FECA's express refusal to grant

district courts the jurisdiction to review under these circumstances.

Humphries contends that even if the Postal Service is entitled to dismiss her claims on the merits, the court is precluded from granting a dismissal in this case because the Postal Service filed its motion well after the filing deadlines for such motion has passed. The court disagrees.

Dismissals for lack of subject matter jurisdiction pursuant to Rule 12(b)(1) are never predicated on the merits of the underlying claim, Exchange, 544 F.2d at 1130-1131; may be granted at any time by a court, prior, during, or even after trial, Clark v. Paul Gray, Inc., 306 U.S.583 (1939); and can never be waived by the parties, Insurance Corp., 456 U.S. 694, 702 (1982). See also Rule 12(b)(1), Fed. R. Civ. P.; Rule 12(h)(3), Fed. R. Civ. P. While it is regrettable that the Postal Service "did not raise the FECA issue more promptly, once that issue [is] raised, the district court [has] no discretion to proceed to a final adjudication of the cause of action...." Joyce, 474 F.2d at 219. Accordingly, "where there is no jurisdiction over the subject matter, there is, as well, no discretion to ignore that lack of jurisdiction." Id.

B. Employment Discrimination Claims

The Postal Service next contends that Humphries' employment discrimination claims should be dismissed because she failed to file formal administrative complaints with the appropriate agency in a timely manner. The Postal Service insists that failure to timely file such a complaint constitutes a failure to exhaust administrative remedies as required by the various discrimination statutes upon which Humphries predicates her discrimination claims. The Postal Service, moreover, argues that Humphries is not entitled to maintain her action under the doctrine of equitable tolling. The Postal Service concludes that Humphries failure to timely file her administrative complaint prohibits her from bringing her discrimination claims in federal court. The court agrees.

As a preliminary matter, the court notes that administrative time requirements for an EEOC charge are not jurisdictional preconditions to bringing suit it federal court. Rather, administrative time requirements are treated like statutes of limitations and are "subject to waiver, estoppel and equitable tolling." Boyd v. United States Postal Service, 752 F2.d Zipes v 410, 414 (9th Cir. 1985); see also Zipes v. Trans World Airlines, 455 U. S. 385, 393 (1982); Tillett v.Carlin, 637 F. Supp. 245, 248 (D.Conn. 1985); Malave v.Bolger, 599 F. Supp. 221 (D. Conn. 1985);

Thus, the court construes the Postal Service's motion as a 12(b)(6) motion to dismiss and/or a motion for summary judgement pursuant to Rule 56 rather than a motion to dismiss for lack of subject matter jurisdiction pursuant to Rule 12(b)(1), Fed.R.Civ. P. The Court, moreover, evaluates the Postal Service's motion in light of the applicable legal standards of review 3 and the doctrines of equitable tolling, estoppel, and waiver as applied to the facts of this particular case.

It is settled law that the exhaustion of administrative remedies including compliance with time requirements governing the processing of administrative complaints. Boyd, 752 F.2d at 414-415; Lopez v. Louisiana Nat'l Guard, 733 F. Supp. 1059, 1068 (E.D. La.), aff'd, 917 F.2d 561 (5th Cir. 1990); Tillet, 637 F. Supp at 253; see also, McGuinness v. United States Postal Service, 607 F. Supp. 271 (E.D. Pa. 1985). Failure to file a formal complaint within the fifteen-day time period specified by 29 C.F. R. s 1613.214(a)(1)(ii), the applicable administrative time period governing Humphries' employment discrimination claims, constitutes a failure to exhaust administrative remedies and may preclude a complainant from bringing an action in federal court. Lopez, 733 F. Supp. at 1068; Tillet, 637 F. Supp. at 253.

Here, Humphries filed her formal complaint more than nine days after the expiration of the fifteen-day filing deadline. The ORA determined that she did

not qualify for any exceptions to that deadline. The ORA, moreover, concluded that Humphries failed to provide adequate justification for an extension of the filing period and rejected her appeal of the dismissal of her administrative complaint. Similarly, the EEOC denied her request to reopen the case. Thus, absent either (1) extraordinary circumstances which would entitle Humphries to equitable tolling or estoppel; or (2) a showing that the Postal Service waived the defense of administrative exhaustion, Humphries is precluded from bringing her employment discrimination claims in federal court because of her failure to exhaust administrative remedies in a timely manner.

Humphries does not dispute the fact that her formal administrative complaint was untimely. Rather, she contends that the above equitable principles preclude the court from dismissing her action. The court disagrees.

In general, courts apply the doctrine of equitable tolling to avoid unusually harsh results, including cases involving dismissals "for excusable failures to keep within the required time limitations." Tillett, 637 F. Suppl. at 248 (emphasis added). "The doctrine,however, is not applied by the courts in a freewheeling fashion." Id.; see also Dillman v. Combustion Engineering, Inc., 784 F.2d 57, 60 (2d Cir. 1986); Miller v. Int'l Telephone & Telegraph Corp., 755 F.2d 30, 23-24 (2d Cir.), cert. denied,474 U. S. 851, reh. denied, 474 U. S. 1015 (1985). Rather the

doctrine is reserved for cases involving extraordinary circumstances. Dillman, 784 F.2d at 60; Miller, 755 F2d at 24; Tillet, 637 F. Supp. at 248. Such cases ordinarily involve circumstances in which an employee was "misled by the affirmative misconduct of the agency [or employer] during the administrative phase or. . .in which the employee is particularly unschooled in the filing procedure and is unable to articulate the employment discrimination charge." Tillett, 637 F. Supp. at 248; see also Dillman, 784 F.2d at 60; Cooper v. Bell, 628 F.2d 1208, 1213-1214 (9th Cir. 1980); Siegel v. Kreps, 654 F.2d 773,777 (D.C. cir. 1981)

Here, no such extraordinary circumstances exist to warrant the application of equitable tolling. Humphries was informed on June 26, 1989 at her final interview with the EEO counselor of the fifteen-day filing deadline. Humphries received a Notice of Final Interview (the "Notice") which expressly stated that she had a "right to file a formal complaint within fifteen (15) calendar days after the receipt of this notice." Humphries signed the Notice indicating she had indeed received it on June 26, 1989. (Harvey Dec.at ## 5-6; Cosme Dec. at ## 7-8.) Humphries, moreover, does not allege nor is there any evidence of any affirmative misconduct on the part of the Postal Service which might suggest that she was misled into filing here complaint after the administrative deadline had run. Indeed, the record reveals that Humphries realized she was untimely after making a call to the EEO Counselor to

inquire about the status of her case. During that call the EEO counselor to inquire about the status of her case. During that call the EEO counselor informed her that the complaint was due two days ago. (See Harvey Dec. at ## 7-9.) Only after that conversation did Humphries attempt to justify her late filing on health related grounds, a filing made nine days after the deadline had expired. While the court is not unsympathetic to Humphries' health concerns and her difficulties with the filing process, such concerns are simply insufficient to allow this court to apply the doctrine of equitable tolling in this case.

Similarly, the doctrine of equitable estoppel is also unavailable to Humphries. Unlike equitable tolling, which can be invoked in cases where the plaintiff is unaware of her cause of action because of an employer's fraudulent concealment, the doctrine of equitable estoppel " 'is invoked in cases where the plaintiff knew of the existence of [her] cause of action but the defendant's conduct caused [her] delay in bringing the law suit.' " Dillman, 784 F.2d at 61, quoting Cerbone v. Int'l Ladies Garment Workers' Union, 768 F.2d 45, 49-50 (2d Cir. 1985). Courts apply the doctrine in cases where "the employer has misrepresented the length of the limitation period or in some other way has " 'lulled the plaintiff into believing that it was not necessary for [her] to commence litigation'"

Id. Again, Humphries fails to point to any allegations or evidence of misconduct on the part of the Postal Service which might entitle her to equitable relief under the doctrine of estoppel.

Finally, Humphries insists that the Postal Service has waived its defense of exhaustion of administrative remedies. Specifically, she contends that the Postal Service's own failure to timely file its motion to dismiss and/or for summary judgement in compliance with the court's pretrial deadlines is tantamount to a waiver of the defenses set forth in that motion. Humphries argues that while the failure to file a timely administrative complaint may constitute adequate grounds for dismissing her discrimination claims pursuant to Rule 12(b)(6), Fed. R. Civ. P. or Rule 56, Fed. R. Civ. Pr., such dismissal, unlike its attack on the worker's compensation claims, is not predicated on a lack of jurisdiction and, thus, the court's consideration of the merits of the Postal Service's untimely motion is discretionary. Humphries requires that basic fairness requires the court to deny the Postal Service's motion to modify the pretrial deadlines and to further exercise its discretion in denying the Postal Service's motion to dismiss and/or for summary judgment as untimely. In short, Humphries urges the court to treat the exhaustion defense as waived in this case and thereby preclude the Postal Service from raising the issue of Humphries failure to file a formal administrative complaint in a timely manner. Reluctantly, the court

declines Humphries request. Admittedly, the Postal Service has missed the pretrial filing deadlines. If construed as a motion to dismiss pursuant to Rule12(b)(6), the Postal Service's challenge to Humphries' employment discrimination claims are 115 days late. If construed as a motion for summary judgment under Rule 56, the motion is still untimely, albeit only four (4) days. In light of the Postal Service's own tardiness in filing its motion, moreover, common sense and fairness dictate that the court should bar the Postal Service from asserting any challenge to Humphries' claims predicated on a failure to meet a filing deadline.

Unfortunately, the court believes that it lacks discretion in this case to categorically prohibit the Postal Service from asserting that defense. As it notes in its memorandum in support of the motion to modify the pretrial deadlines, the Postal Service has alleged Humphries' failure to timely exhaust administrative remedies as an affirmative defense in its answer to the amended complaint. (See Filing No. 5, Ans. Amend Compl., # 2 at 2). Clearly, the Postal Service's answer to the complaint preserves its right to raise this affirmative defense at some point during the litigation. Even if the court exercise its discretion to deny the Postal Service's motion to dismiss and/or summary judgement as untimely at this stage of the proceedings, the court could not preclude the Postal Service from subsequently raising

the exhaustion issue at trial, either on the merits or as a motion for judgment as a matter of law. See Rule12(h)(2), Fed. R. Civ. P.; Rule 50(a), Fed.R.Civ. P.;' see also Bowen v. Pan American World Airways, Inc., 474 F. Supp. 563, 567 (S.D.N.Y.1979). Indeed, Rule 12(h)(2), Fed. R. Civ. P. expressly preserves the defense of failure to state a claim through the trial stages of an action. See also, 5A Wright & Miller, ss 1392 at 757, n.1 and cases cited therein.

It is well settled, moreover, that a court may consider an untimely dispositive motion predicated on a failure to state a claim in cases, such as this one, where that specific defense "has been previously included in the answer." Bowen, 474 F. Supp. at 567; see also Weatherhead v. Globe Int'l, Inc., 832 F.2d 1226, 1228 (10th Cir. 1987)(defense of dismissal is waived only when presented after trial); Stock 'In S.A. v. Swissco, Inc., 748 F. Supp. 23, 27 (D.D.C. 1990)(untimely (12(b)(6) motion may be considered at any time by the court and is also timely where substantive defense has been raised affirmatively in the answer.); 5A Wright & Miller, ss 1361 at 444=445.

Underlying this view, is the policy of judicial economy implicit in not requiring the parties to go to trial on a claim that cannot be established by the plaintiff as a matter of law. Here, that policy figures significantly in the court's decision to grant the Postal Service's motion to modify

the pretrial deadlines and consequently treat the Postal Service's motion to dismiss and/or for summary judgment as timely. Had the Postal Service not expressly raised the defense of failure to state a claim and failure to timely exhaust administrative remedies in its answer to the amended complaint, Humphries' waiver claim would prevail. Because the Postal Service's defenses are clearly preserved in this case, however, the court believes that to have denied the motion to modify and to rule that the dispositive motion is untimely, would in no way legally preclude the Postal Service from asserting those defenses at trail and, therefore, would merely create a waste of time and expense for Humphries, the Postal Service and the court.

Conclusion

For the reason stated above, the court dismisses all counts in this action.

SO ORDERED this 18 day of May, 1992 at Hartford, Connecticut.

Alan H. Nevas
United States District Judge

[1]2 The complaint states in relevant part: WHEREFORE, the plaintiff [sic]:. . . . [#]3. Restoration of rank and priveledges [sic], resolution of longstanding Workmen's Compensation Issues [sic], resolution of leave buy-back, legal assistance on 3rd part issue, compensation for promotion denied, investigation of allegations by competent authority , quantum determinations on entitlements denied by Postal Service Managers and/or Workmen's Compensation; rehabilitation and payment of medical bills.

[2]3 When considering a motion to dismiss, the court accepts all factual allegations as true and draws inferences from these allegations in the light most favorable to the plaintiff. Schauer v. Rhoses, 416 U. S. 232, 236(1974); Corcoran v. American Plan Corp., 886 F.2d 16, 17 (2d Cir. 1989). A motion to dismiss should not not be granted unlkess "it appears beyond doubt that the plaintiff can prove no set of facts in support of the claim which would entitle him to relief." Conley v. Gibson, 355 U. S. 41

3 When conidering a motion to dismiss, the court accepts all factual allegations as true and draws inferences from these allegations in the light most favorable to the Plaintiff. Schauer v. Rhodes, 416 U. S. 232, 236 (1974); Corcoran v. American Plan Corp., 886 F.2d 16, 17 (2nd Cir. 1989). A motion to dismiss should not be granted unless "it appears beyond doubt that the plaintiff can prove no set of facts in support of the claim which would entitle him

to relief."Conley v. Gibson, 355 U. S. 41, 45-46 (1957); Patton v. Dole, 806 F 2.d 24, 30 (2nd Cir. 1986). "The issueis not whether a plaintiff's successon the merits is likely but rather whether the claimant is entitled to proceed beyond the threshold in attempting to establish his claims." De Laa Cruz v.Tormey, 582 F.2d 45, 48 (9th Cir. 1978), cert. denied, 441 U.S. 965 (1979). Thus, the question for the court to decide is "whether or not it appears to a certainty under existing law that no relief can be granted under any set of facts that might be proved in support of plaintiff's claims." De La Cruz, 582 F.2d at 48.

In a motion for summary judgment, the moving party bears the burden of establishing that no genuine issues of material fact are in dispute and that it is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); Anderson v. Liberty Lobby, Inc. 477 U. S. 242, 256 (1986). Rule 56(c) mandaes summary judgment "after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an essential element to that party's case, and on which the party will bear the burden of proof at trial." Celotex Corp. v. Catrett, 477 U. S. 317, 322 (1986). All factual inferences are drawn in favor of the non-moving party. Ramseur v. Chase Manhattan Bank, 865 F 2d 460, 465 (2nd Cir. 1989.

The court notes that under either standard, the Postal Service prevails in this case. Accordingly, the court need not decide whether to treat the Postal Service's motion as a Rule 12(b)(6) or a Rule 56 motion.